

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

NO. 5:10-cv-00286-FL

TERRY D. COTTLE, AND WIFE, SUSAN)
W. COTTLE,)

Plaintiffs,)

v.)

CITIMORTGAGE, INC., AND SHAPIRO)
& INGLE, LLP, AS TRUSTEE OF A)
DEED OF TRUST,)

Defendants.)

ORDER

This matter is before the court on defendant Citimortgage's ("Citimortgage") motion to dismiss plaintiffs' original complaint (DE #8), plaintiffs' motion to amend the complaint (DE #15), and the parties' joint motion to continue the telephonic scheduling conference set for October 28, 2010 (DE #22). For the reasons that follow, the court GRANTS plaintiffs' motion to amend (DE #15), DENIES AS MOOT Citimortgage's motion to dismiss plaintiffs' original complaint (DE #8), and GRANTS the parties' joint motion to continue the telephonic scheduling conference (DE #22).

BACKGROUND

Plaintiffs initiated this action in the Superior Court of Wayne County, North Carolina, on June 17, 2010. Citimortgage timely filed notice of removal in this court on July 21, 2010, and on July 28, 2010, Citimortgage filed a consent motion for extension of time to file an answer or otherwise plead in response to plaintiffs' complaint. By order entered August 2, 2010, the court granted Citimortgage's motion and extended the time within which to respond to plaintiffs' complaint to August 11, 2010.

Citimortgage filed a motion to dismiss plaintiffs' complaint on August 11, 2010. The court granted the parties' consent motion for extension of time to file a response to the motion to dismiss, extending the deadline to September 20, 2010. On that date, plaintiffs filed a motion to amend the complaint. Citimortgage filed a response in opposition to plaintiffs' motion to amend the complaint on October 7, 2010, contemporaneously filing a separate motion to dismiss plaintiffs' proposed amended complaint. In an order entered October 21, 2010, the court granted plaintiffs' motion for extension of time to respond to Citimortgage's motion to dismiss the proposed amended complaint, extending the time for responding to November 22, 2010.

ANALYSIS

A. Plaintiffs' Motion to Amend

Federal Rule of Civil Procedure 15(a) governs the amendment of pleadings before trial. Rule 15(a)(1) provides:

- A party may amend its pleading once as a matter of course:
- (A) before being served with a responsive pleading; or
 - (B) within 21 days after serving the pleading if a responsive pleading is not allowed and the action is not yet on the trial calendar.

Fed. R. Civ. P. 15(a). If a party is not entitled to amend its pleading as a matter of course, the party must have consent of the opposing party or seek leave of court to amend its pleading. Fed. R. Civ. P. 15(b).

Rule 7(a) provides that a motion to dismiss is not a pleading under the Federal Rules of Civil Procedure. A motion to dismiss filed in opposition to a complaint is therefore not a responsive pleading within the meaning of Rule 15(a). Domino Sugar Corp. v. Sugar Workers Local 392, 10 F.3d 1064, 1068 n. 1 (4th Cir. 1993). Accordingly, where a complaint is opposed only by a Rule

12(b)(6) motion to dismiss, the plaintiff retains the right to amend without leave of the court because the complaint has not yet evoked a responsive pleading. Galustian v. Peter, 591 F.3d 724, 730 (4th Cir. 2010).

In this case, where plaintiffs have not yet amended as of right and the defendant has not filed a responsive pleading within the meaning of Rule 15(a)(1)(A), plaintiffs have retained the right to amend once as a matter of course. Plaintiffs therefore do not need leave of court to amend their complaint. Accordingly, plaintiffs' motion to amend the complaint (DE #15) is GRANTED. Citimortgage's motion to dismiss the original complaint (DE #8) is DENIED AS MOOT.

B. Joint Motion to Continue Scheduling Conference

On October 21, 2010, Citimortgage filed a joint motion to continue the telephonic scheduling conference set for Thursday, October 28, 2010. Also on October 21, 2010, the court granted plaintiffs' motion for extension of time to respond to Citimortgage's motion to dismiss the amended complaint, extending the time for response up to and including November 22, 2010.

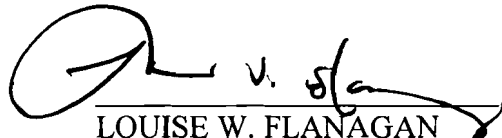
For good cause shown, the parties' joint motion to continue the scheduling conference (DE #22) is hereby GRANTED. The scheduling conference is continued pending resolution of Citimortgage's motion to dismiss the amended complaint, to which plaintiffs have been given an extension of time to respond. If any issues remain in the case upon resolution of the motion to dismiss the amended complaint, the court will notify the parties of the date and time for a telephonic scheduling conference by separate order.

CONCLUSION

For the foregoing reasons, plaintiffs' motion to amend the complaint (DE #15) is GRANTED, Citimortgage's motion to dismiss the original complaint (DE #8) is DENIED AS

MOOT, and the parties' joint motion to continue the scheduling conference (DE #22) is GRANTED.

SO ORDERED, this the 20th day of October, 2010.


LOUISE W. FLANAGAN
Chief United States District Judge